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5 UNITED STATES DISTRICT COURT
6 WESTERN DISTRICT OF WASHINGTON
7 AT SEATTLE
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9 TRAVELERS PROPERTY CASUALTY
10 COMPANY OF AMERICA, a foreign
11 insurer,

12 Plaintiff,
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14 v.
15 WALSH CONSTRUCTION COMPANY II
16 LLC, an Illinois Limited Liability Company;
17 and ARCH SPECIAL INSURANCE
18 COMPANY, a foreign insurer,
19
20 Defendants.

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22 WALSH CONSTRUCTION COMPANY II,
23 LLC, an Illinois Limited Liability Company,

24 Third Party Plaintiff,
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26 v.
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28 GREENWICH INSURANCE COMPANY,
29 a foreign insurer,
30
31 Third Party Defendant.

CASE NO. 2:22-CV-00589 RSM-BAT

**ORDER GRANTING WALSH
CONSTRUCTION COMPANY II,
LLC'S MOTION FOR LEAVE TO
AMEND COUNTERCLAIM AND
THIRD-PARTY COMPLAINT**

Walsh Construction Company II, LLC (“Walsh”) filed a Motion for Leave to Amend Counterclaim against the Travelers Casualty Property of America (“Travelers”) and Third-Party Complaint against Greenwich Ins. Co. (“Greenwich”). Dkt. 90-2. Greenwich does not oppose the

1 proposed amendment. Dkt. 96. Travelers opposes the proposed amendment on the grounds of
 2 futility. Dkt. 94. For the reasons stated herein, the Court grants the motion.

3 BACKGROUND

4 On May 2, 2022, Travelers filed this insurance coverage dispute against Walsh and one
 5 of Walsh's other insurers, Arch Specialty Insurance Co. ("Arch"). Walsh filed Counterclaims
 6 against Travelers and a Third-Party Complaint against Greenwich. The parties agreed to stay
 7 motion practice and discovery related to all issues other than the duty to defend. Dkt. 51. On July
 8 11, 2023, the Court struck the existing trial date and entered a stay of "all discovery and motion
 9 practice related to Walsh's extra-contractual claims and any issues related to indemnity coverage
 10 under any policy that is determined to provide Walsh with a duty to defend." Dkt. 52.

11 The parties proceeded with litigating the duty to defend, with each party filing a motion
 12 for summary judgment. While the summary judgment motions were pending, the underlying
 13 lawsuit was voluntarily dismissed, thereby rendering the issue of Travelers' ongoing defense
 14 obligation moot. On February 7, 2024, the Court ruled on the parties' motions, dismissing
 15 Travelers' claims against Arch and holding that Travelers and Greenwich had a duty to defend
 16 Walsh in the underlying lawsuit. Dkt. 75; Dkt. 84. The Court also declared "that Greenwich
 17 had a duty to defend and breached that duty." Dkt. 75 at p. 21; Dkt. 84.

18 The parties filed a Joint Status Report on March 22, 2024 (Dkt. 86), in which Walsh
 19 stated its intent "to move to amend its counterclaims and Third-Party Complaint to conform to
 20 information obtained in discovery, and to clarify the factual and legal basis for its claims against
 21 Travelers and Greenwich." Dkt. 86, p. 3. On March 28, 2024, the Court lifted the stay and set
 22 April 22, 2024, as the deadline to amend the pleadings. Dkt. 87.

1 On April 5, 2024, Walsh sent counsel for Travelers and Greenwich a written request to
2 consent to the proposed Amendments. Neither Travelers nor Greenwich responded to Walsh's
3 request.

WALSH'S PROPOSED AMENDMENTS

5 Walsh seeks to amend its pleadings to include information acquired during discovery.
6 From Walsh’s review of Travelers’ claim file, Walsh discovered Travelers Adjuster Sandy Ngo
7 acknowledged that because the underlying lawsuit was filed in Washington, Travelers would
8 likely owe Walsh pre-tender fees and costs. Dkt. 91, Declaration of Alexander E. Ackel (“Ackel
9 Decl.”); Dkt. 92, Ex. A (Excerpt of Travelers Claims Notes for Claim No. ACQ6261). But at no
10 point in the handling of Walsh’s claim did Travelers ask Walsh about any pre-tender fees and
11 costs or acknowledge that it owed such fees. Walsh incurred over \$75,000 in defense fees and
12 costs between the date of filing of the Underlying Lawsuit and the date Travelers agreed to offer
13 a reservation of rights defense to Walsh. Under the Washington Unfair Claims Settlement
14 Practice regulation WAC 284-30-350(1), it is an unfair and deceptive trade practice for an
15 insurer to fail to disclose pertinent policy benefits and coverages to its insured. Accordingly,
16 Walsh seeks to include specific allegations regarding Travelers’ failure to act in good faith and in
17 compliance with this regulation. See Dkt. 90-2, ¶¶ 50-53, 73-74,77.

18 Similarly, in discovery of Greenwich’s claim file, Walsh learned Greenwich had made no
19 effort to respond to Walsh’s tender of defense until it belatedly offered a reservation of rights
20 defense on June 23, 2023 – on the eve of the parties’ motions for summary judgment. See Dkt.
21 45-1 at pp. 23-33. The Court declared as a matter of law that Greenwich breached its duty to
22 defend Walsh. Dkt. 75, p. 21; Dkt. 84. Walsh seeks to amend the factual allegations of its
23 pleadings to account for the fact that neither Greenwich nor Travelers made any effort to inform

1 Walsh that it was entitled to be reimbursed for pre-tender fees and costs. This failure to pay pre-
 2 tender fees and costs amounts to a breach of the insurance policy issued by Greenwich and
 3 Travelers. Accordingly, Walsh is also seeking to amend its pleadings to include express claims
 4 for breach of contract regarding the failure to pay defense fees and costs. Dkt. 90, pp. 3-4

5 DISCUSSION

6 Fed. R. Civ. P. 15(a)(2) provides that after a party has amended a pleading once as a
 7 matter of course or the time for amendment has expired, a party may amend only by obtaining
 8 leave of court or by consent of the adverse party. Leave to amend should be freely given when
 9 justice so requires. *Id.* The grant or denial of leave to amend is within the discretion of the trial
 10 court. *Foman v. Davis*, 371 U.S. 178, 182 (1962). In general, if the underlying facts or
 11 circumstances relied upon by a plaintiff may be a proper subject of relief, he ought to be afforded
 12 an opportunity to test his claim on the merits. In the absence of any apparent or declared reason –
 13 *i.e.*, undue delay, bad faith, or dilatory motive on the part of the movant, repeated failure to cure
 14 deficiencies by previously allowed amendments, undue prejudice to the opposing party, or
 15 futility of amendment – leave to amend should be freely given. *Id.*, 371 U.S. at 182 (per
 16 Goldberg, J.). Perhaps the most important of these factors is the prejudice that will be sustained
 17 by the opposing party. *Fosmire v. Progressive Max Ins. Co.*, C10-5291JLR, 2011 WL 4459780
 18 at *2 (W.D. Wash. Sept. 26, 2011) (quoting *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d
 19 1048, 1052 (9th Cir. 2003)).

20 Here, there is no question of undue delay, bad faith, or dilatory motive on the part of
 21 Walsh, repeated failure to cure deficiencies by previously allowed amendments, or undue
 22 prejudice to Travelers. This is the first amendment sought by Walsh and the motion was filed
 23 prior to the current deadline to amend pleadings. Dkt. 87. Walsh also telegraphed its intent to

1 amend its pleading in the parties' Joint Status Report filed on March 22, 2024 (Dkt. 85) and
 2 provided the proposed amendments to Travelers and Greenwich shortly after the Court lifted the
 3 stay. Dkt. 91, Ackel Decl., ¶ 3. As previously noted, Greenwich has no opposition to Walsh's
 4 proposed amendments. Dkt. 96.

5 Travelers concedes pre-tender defense costs are recoverable, but argues Walsh already
 6 unsuccessfully litigated this issue. Dkt. 94, p. 2. Travelers also concedes defense costs incurred
 7 after litigation are recoverable but argues Walsh failed to properly present a claim to Travelers
 8 for these costs. Dkt. 94, p. 3.

9 Walsh's proposed amendment includes more than a breach of contract claim for the
 10 recovery of defense costs. The proposed amendment includes factual allegations describing
 11 Travelers' obligations under the Washington Consumer Protection Act and alleges Travelers
 12 breached those obligations in bad faith by "failing to inform Walsh of pertinent policy benefits
 13 and coverages." In addition to pre-tender and post filing defense costs, Walsh also claims
 14 Travelers is liable to Walsh for "attorneys' fees and costs incurred to hire an appellate firm to
 15 handle Walsh's appeal of King County's summary judgment, the amount Walsh has to pay to
 16 satisfy the judgment entered against it in favor of UGSI, and Mears."¹ Travelers does not address
 17 these claims in its opposition and fails to explain how these amendments are improper or how it
 18 would be prejudiced.

19 Travelers also argues any breach of contract claim related to its alleged failure to pay
 20 Walsh's pre-tender fees are frivolous and futile because this issue was already litigated. This is
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22 ¹ On April 8, 2022, before Travelers filed this declaratory relief action, Walsh presented a claim
 23 for reimbursement of its appellate costs to Travelers. Travelers responded it was not aware of
 any authorization to the use of Walsh's counsel for the performance of appellate work. See Dkt.
 99, Ackel Decl., Ex. A (Email Correspondence between Douglas Persoon and Travelers).

incorrect. On July 6, 2023, Walsh moved for summary judgment against Greenwich (Dkt. 44) and Travelers (Dkt. 48). Magistrate Judge David W. Christel recommended Walsh’s Motion against Greenwich—in which Walsh sought an order declaring that Greenwich owed Walsh a duty to defend and that Greenwich violated that duty—be granted fully. Walsh’s Motion against Travelers similarly asked for an order declaring that Travelers owed Walsh a duty to defend, but also sought a declaration that Travelers’ duty to defend included paying for defense costs incurred between the time of the filing of the underlying action and Travelers’ acceptance of the tender with a reservation of rights. Walsh “reserve[d] for future motion practice the issue of . . . the amount of any damages it sustained as a result.” Dkt. 48, p. 6.

10 Although Magistrate Judge Christel found that Travelers had a duty to defend, he found
11 he could not rule as a matter of law that Travelers owed any defense costs because Walsh had
12 failed to cite to the insurance policy or provide proof of when it tendered a claim for the defense
13 costs. Dkt. 75, p. 11; Dkt. 84, p. 2 (Order Adopting)(“Walsh’s Objections fail to demonstrate that
14 Travelers owes any pre-acceptance defense costs as a matter of law based on the available
15 evidence.”)

16 Moreover, Travelers' concession that it owes some defense costs does not preclude
17 Walsh from including consumer protection and breach of contract claims for all its unpaid
18 defense costs as Walsh's ability to recover damages is constrained by the allegations contained in
19 its pleadings. Because Travelers concedes Walsh is entitled to defense costs, there can be no
20 prejudice to Travelers if Walsh now amends its pleadings to include these claims.

CONCLUSION

22 There is no showing of undue delay, prejudice, or futility. The proposed amendments do
23 not substantially alter the theory on which this case has been proceeding nor is there any

1 indication that addition of the proposed claims will create added expense or additional discovery
2 beyond what is already necessary, or lead to a more complicated or lengthy trial.

3 Accordingly, it is **ORDERED** that Defendant Walsh Construction Company's Motion
4 for Leave to Amend the Third-Party Complaint against Greenwich and the Counterclaim against
5 Travelers (Dkt. 90) is **GRANTED**. The Clerk shall post the proposed amendment (*see* Dkt. 90-
6 2) as Walsh Const. Co. II LLC's First Amended Counterclaim and Third-Party Complaint.

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8 DATED this 7th day of May, 2024.

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BRIAN A. TSUCHIDA
United States Magistrate Judge

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